IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1589

GENERAL ELECTRIC COMPANY,
Petitioner,

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.

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GENERAL ELECTRIC COMPANY.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONER, GENERAL ELECTRIC COMPANY

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OPINIONS BELOW

The opinion of the court of appeals (Supp. Br. Jt. Pet. 1a-14a)[1] is reported at 519 F.2d 661. The opinion of the District Court for the Eastern District of Virginia (Jt. Pet. 2a-38a) is reported at 375 F. Supp. 367.

JURISDICTION

On June 17, 1975, all parties in the court below filed a joint petition requesting that a writ of certiorari issue in advance of the judgment of the court of appeals.[2] Thereafter, on June 27, 1975, the court of appeals issued its judgment (Supp. Br. Jt. Pet. 15a-16a), affirming the judgment of the district court. On October 6, 1975, the Court granted the joint petition for certiorari. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the exclusion of pregnancy-related disabilities from coverage under an employer disability

[1] References designated "Supp. Br. Jt. Pet." are to the Supplemental Brief Of All Parties To The Joint Petition For A Writ Of Certiorari; references designed "Jt. Pet." are to the latter petition.

The printed Single Appendix is in four volumes and is paginated consecutively; references thereto will, for exemple, be as follows: "I App. 36."

[2] The parties to the joint petition for certiorari stated therein (p. 1, n. 1) they had agreed, subject to the Court's approval, that General Electric Company would be treated as petitioner with respect to the briefing and oral argument in this Court if certiorari were granted. The parties have been informed by the Court's clerk to proceed as thus agreed.

income protection plan constitutes sex discrimination proscribed by Title VII of the Civil Rights Act of 1964, as amended.

STATUTE INVOLVED

The relevant statutory provision is Section 703 of Title VII of the Civil Rights Act of 1964, as amended (78 Stat. 253, 86 Stat. 103, 42 U.S.C. § 2000e, *et seq.*), which in pertinent part provides as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex
>
> . . . .
>
> * * * *

STATEMENT

In March 1972, a complaint was filed against petitioner General Electric Company ("GE") in the United States District Court for the Eastern District of Virginia, in which it was in substance alleged that GE provides disability insurance for all its employees covering non-occupational sickness and accidents, but excluding disabilities arising from pregnancy, miscarriage or childbirth; that each of seven named individual plaintiffs[3] was pregnant during the years

[3] Plaintiffs in the action were seven named female persons; International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC ("the IUE"); and the latter's affiliate, Local 161, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC ("Local 161"). The seven

1971 or 1972, and made claim for sickness and accident insurance benefits during the period of absence from work as the result of pregnancy; and that GE failed to satisfy such claims, and thereby, in violation of Title VII of the Civil Rights Act of 1964, discriminated against the named individual plaintiffs because of their sex. The district court determined that the suit could be maintained as a class action on behalf of all GE female employees, whether represented by plaintiff unions, by other unions, or whether unrepresented (I App. 118, 128-31; Jt. Pet. 4a).

The case was tried before the district court on July 24, 25, and 26, 1973. On April 13, 1974, the district court rendered an opinion in which it held that GE's failure to pay sickness and accident benefits to plaintiffs and the members of the class they represent for work absences due to pregnancy-related disabilities constitutes sex discrimination in violation of Title VII (Jt. Pet. 2a-38a).[4]

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individually named plaintiffs are present or former hourly paid production employees at GE's plant in Salem, Virginia. The IUE, and/or a number of its Locals, is the collective bargaining representative of hourly-paid production and maintenance employees at a number of GE plants in the United States. Plaintiff Local 161 is a joint collective bargaining representative, with the IUE, of the hourly-paid production and maintenance employees at GE's Salem Plant (I App. 18-19).

[4] The district court entered an order, *inter alia*, enjoining GE from discriminating against its female employees by failing to pay weekly disability benefits for absences from work due to pregnancy-related disabilities, and stating that monetary judgments, in amounts to be determined by the court, would be entered in favor of the affected female employees (Jt. Pet. 76a). On May 9, 1974, the district court entered an order (Jt. Pet. 50a) staying enforcement of its injunction.

On June 27, 1975, the court of appeals, 2-1, affirmed the district court's judgment (Supp. Br. Jt. Pet. 1a-14a).

I. THE FACTS

A. GE's Insurance Coverage

As part of a comprehensive insurance package, which provides life insurance and insurance against medical, surgical, and hospital expenses, GE also provides weekly non-occupational sickness and accident insurance for all its employees in an amount equal to 60 percent of an employee's normal straight-time weekly earnings up to a maximum weekly benefit of $150. Benefit payments are paid to employees who become totally disabled; such payments start with the eighth day of an employee's total disability (or with the first day of an employee's confinement in a hospital as a bed patient, if earlier), and continue during the employee's total disability up to a maximum of 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related cause or causes. Benefit payments are not payable, however, for any absence due to pregnancy or resulting childbirth or to complications in connection therewith (III App. 1064-65).

GE's weekly non-occupational sickness and accident insurance is included in a collective bargaining agreement with plaintiff IUE and its affiliated Locals and applies to employees represented by those unions. The insurance is also applicable to certain other GE employees who are represented by unions other than the IUE and its affiliated Locals pursuant to collective bargaining agreements between GE and such unions (I App. 175, 193-95).

B. Reasons Underlying GE's Pregnancy Exclusion

A number of reasons underlie GE's decision to exclude pregnancy from coverage under the sickness and accident insurance it provides employees: (1) the insurance is intended to take care of disabilities resulting from sickness or accident—that is, disabilities caused by sudden and unforeseen events—and pregnancy, which is voluntary and subject to planning, is neither a sickness nor an accident (II App. 595); (2) GE's insurance plan follows standard insurance practice which, for the most part, does not cover pregnancy under sickness and accident insurance (II App. 595); (3) pregnancy coverage would not be a reasonable or rational use of benefits money, in that it would be subject to abuse resulting from prolonged absences because of pregnancy, and would likely be an incentive to an increased number of pregnancies (II App. 595-96); (4) because females are absent from work more frequently than are males and have absences of greater duration, female employees receive a greater proportion of sickness and accident benefits than do male employees,[5] and the inclusion of pregnancy coverage would accentuate such imbalance (II App. 600); (5) approximately 40 percent of GE's female employees who have babies do not return to work, and therefore to provide them with sickness and accident benefits would, in effect, be according them a form of

[5] In 1970, GE's average cost per insured employee of total benefits paid under sickness and accident insurance was $82.57 for females and $45.76 for males; in 1971, the average cost was $112.91 for females and $62.08 for males (I App. 198-99).

severance pay not available to other employees (II App. 600-601).[6]

C. Insurance Industry Practice; The Cost of Pregnancy Coverage

Uncontradicted actuarial testimony [7] concerning insurance industry practice and experience with respect

[6] In 1970, of 3,548 pregnancies among GE female empolyees (3,401 of which resulted in childbirths, and 147 of which were aborted or resulted in miscarriages), 1,956 women returned to work after pregnancy-caused absences and 1,592 did not return; in 1971, of 2,781 pregnancies (2,601 of which resulted in childbirths, and 180 of which were aborted or resulted in miscarriages), 1,634 women returned to work after pregnancy-caused absences and 1,147 did not return (I App. 191, 253-54).

Statistics reflecting general turnover of employees in GE plants are in contrast to the 40 percent non-return rate among GE females who have babies: a study of the 1972 employee turnover in seven GE plants selected for their large female population (GE Exh. 41A, II App. 570-74, III App. 840-43) revealed that the female "quits as percentage of total employment" was 18 percent, as compared with 11 percent for the male employees. A second study of four plants (GE Exh. 41B, II App. 570-74, III App. 844-45) showed a 10 percent quit rate for females as compared with a 6 percent quit rate for males. (In accordance with the local rules of the district court, the parties submitted to the court in advance of trial lists of proposed exhibits they intended to offer. Although these lists have not been reproduced in the joint appendix, their filing dates are noted in the Docket Entries (I App. 6, 8, 12). At the start of the trial, the court ruled upon plaintiffs' exhibits (I App. 309-10). Subsequently, the court admitted in evidence defendant GE's offered exhibits (II App. 451)).

[7] By actuary Paul Jackson, a Fellow in the Society of Actuaries. Mr. Jackson has worked in the area of disability in-

to disability insurance demonstrated that approximately 40 percent of the workforce in the United States under age 65, or some 32,000,000 employees, is covered by sickness and accident disability insurance. The benefit periods of this insurance vary: about 45 percent of the plans provide 13 weeks benefit coverage; 50 percent provide coverage for 26 weeks; and only 5 percent provide coverage for 52 weeks (II App. 528; GE Exh. 42, III App. 846-48). Only 40 percent of these plans, covering about 12,800,000 employees, provide a pregnancy benefit, and such coverage is almost always limited to six weeks (II App. 529). At the time of trial, moreover, the cost per unit of benefit under the existing insurance for a female employee was approximately 170 percent of that for a male employee even where no maternity benefit was provided; where a six-weeks maternity benefit was provided, the female cost per unit of benefit ran to 210 percent of the male employee cost; and the latter percentage increased to 300-330 percent of the male employee cost per unit of benefit where full maternity coverage was provided (II App. 536).

According to actuarial calculations, the annual cost of adding maternity benefits to the sickness and accident disability income plans in effect in the United States at the time of trial would be $1,353,000,000 [8] (II App. 537; GE Exh. 42, III App. 848).[9]

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surance since 1956. His *Curriculum Vitae* is found in GE Exh. 51, II App. 522-23, 526. A list of his published writings is found in GE Exh. 47, III App. 850-55.

[8] This figure was predicated upon plans then existent in the United States (II App. 537).

[9] Another actuarial study in evidence in the case put the additional cost per year for a 20 weeks maternity benefit at

There are features unique to pregnancy claims which, from an actuarial standpoint, increase the relative cost of pregnancy insurance coverage: First, the fact that income loss will occur at a predictable time "well off in the future" allows for disability "planning" and opens the possibility of claim abuse (II App. 532-33). Second, pregnancy, unlike most sickness and accidents, is not wholly beyond the control of the insured (II App. 533). Third, the duration of ordinary disability and maternity claims is different, the median duration of the former being two weeks and the latter 13 weeks (II App. 533).[10] Fourth, concern for the child and initial child care requirements act as incentives for the mother to put off resumption of work (II App. 533). Finally, in maternity cases, "approximately half of the female employees who have children do not return to work,"

$1,005 million; for a 25 weeks benefit at $1,313 million; and for a 30 weeks benefit at $1,620 million (GE Exh. 13, II App. 737-38). This study was made by Alexander J. Bailie, a Fellow in the Society of Actuaries since 1960, who is the actuary in charge of actuarial functions pertaining to group insurance for Metropolitan Life Insurance Company.

[10] GE's experience regarding the duration of pregnancy absences *prior to the date of delivery* (exclusive of data concerning ectopic pregnancies, caesarian births, abortions, and miscarriages) is as follows: in 1971, when there were 2,476 pregnancy absences, some 361, or only 15 percent, were less than 5 weeks duration; some 718, or 29 percent, were between 8 and 11 weeks duration; and some 558, or some 22 percent, were between 12 and 15 weeks duration. In 1970, when there were 3,261 pregnancy absences, some 395, or only 15 percent, were less than 5 weeks duration; some 983, or 30 percent, were between 8 and 11 weeks duration; and some 710, or 21 percent, were between 12 and 15 weeks duration (I App. 199-200).

whereas generally 100 percent of those employees who recover from short term disabilities return to work (II App. 532).

D. The Unique Nature of Pregnancy

1. *Pregnancy Is Not A Sickness.*

Three medical experts, Doctors Forrest, Hellegers, and Wilbanks, testified in the case.[11] All agreed that pregnancy is a "normal physiological function," which is not a sickness,[12] disease, or illness (I App. 345, 362, II App. 488, 492, 674, 685-86). For example, Dr. Hellegers testified that the most common definition of disease is "that which, if not corrected, would continue leading to further disability and ultimately to death" (II App. 458). Contrasting pregnancy and disease, Dr. Hellegers testified graphically (II App. 488):

> I seem to recall saying that I thought it would be strange if the human race survived on the basis of a disease.

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[11] Dr. David Forrest, a Richmond physician who specializes in obstetrics and gynecology (I App. 313-14, 315), and Dr. Andre Hellegers, professor at Georgetown University, who practices in the field of obstetrics (II App. 452-53, 455), testified on behalf of plaintiffs. The testimony of Dr. George D. Wilbanks, Chairman of the Department of Obstetrics and Gynecology, Rush Presbyterian-St. Lukes Medical Center, Chicago, and a practicing obstetrician and gynecologist (II App. 670-77, 678), was presented by way of deposition on behalf of GE.

[12] Dr. Wilbanks testified that the period after childbirth was not a period of illness; it was rather "a period of return of the altered state of physiology back to the more usual state . . . to the pre-pregnancy state" (II App. 686).

Dr. Wilbanks testified that the term " 'disease' would be the medical term and 'illness' and 'sickness' would be the lay terms for the similar condition," and that in general the terms are "synonomous" (II App. 679). He also testified that "most women probably do benefit from having a child" (II App. 686).

Approximately 10 to 15 percent of women have complications associated with pregnancy (I App. 344, II App. 492),[13] but not all such complications require a women to stop work (I App. 323-24): only 1 percent to 2 percent of the women with complications have those that could be classified as "major" (I App. 344), and of this very small percentage only some require hospitalization (I App. 344-45).

2. *Pregnancy Is A Voluntarily Induced And Maintained Condition.*

Pregnancy can be avoided through the use of contraceptive devices. Dr. Wilbanks testified: "I would

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[13] Ten percent of all pregnancies terminate in miscarriage or "spontaneous abortions" (II App. 461). Ninety percent occur prior to the thirteenth week of pregnancy (II App. 493). Miscarriages are usually not disabling, nor is hospitalization usually required: "by and large" most are an "in and out phenomenon within one day" (II App. 492).

The second category of "complications" are those preexisting conditions or underlying tendencies that are aggravated or brought out by the weight gain which routinely accompanies pregnancy (II App. 456-57, 495-98). At least one half do not require hospitalization (II App. 499). Usually the treatment is, like the treatment of the disease itself, unaffected by the pregnancy (II App. 468).

The third category are those complications which result simply from the presence of the fetus or placenta (I App. 351-53). At least a half of these do not require hospitalization (I App. 353-54, II App. 499).

say that we really have a pretty much unlimited method of contraception or virtually foolproof methods of contraception if you use some type of contraceptive" (II App. 690-91); the pill, Dr. Forrest said, "reduce[s] the chances of pregnancy to practically zero" (I App. 342); Dr. Hellegers testified that considering the way the population uses the pill, there would be "one pregnancy in 100 years of exposure to intercourse" (II App. 477); and Dr. Wilbanks stated that the pill, if taken properly, "is virtually a hundred percent" effective (II App. 690). Dr. Forrest, moreover, testified that the pill is commonly regarded in the obstetrics community as being safer than childbirth (I App. 342-43).

The IUD is a medically acceptable alternative method of contraception. As to the IUD, Dr. Wilbanks testified that it "perhaps is a little less effective" than the pill, noting, moreover, that new models are even more effective (II App. 690). Dr. Hellegers testified that the IUD failure rate can be reduced to about "four per 100 years of exposure" to intercourse (II App. 478)."[14]

[14] Dr. Wilbanks testified that in addition to birth control pills and intrauterine devices, other "standard methods" of contraception are the diaphragm, the vaginal diaphragm, the condom, creams, foam, or rhythm (II App. 690). The use of these latter methods, he testified, resulted in "relatively little if any serious problem" (II App. 716). Moreover, Dr. Wilbanks testified that "rhythm can be used by certain couples very satisfactorily . . ." (II App. 709). Dr. Hellegers also testified that alternative methods of contraception such as "barrier methods, diaphragm, foams, condoms, and so forth . . ." are available (II App. 478). Dr. Hellegers made reference to a study on the use of the diaphragm among a group in Indianapolis wherein it was found that there was only a two percent failure rate (II App. 478).

There is also a back-up method to avoid pregnancy —the "morning after" pill. The "morning after" pill has been accepted by the Food and Drug Administration, and it is quite effective if used properly (II App. 690). In addition, there is a safe, convenient, and widely used method to terminate pregnancy —abortion. Dr. Wilbanks testified that under proper conditions and safeguards abortions are safe and effective (II App. 690). One method, menstrual extraction, requires just a few minutes, and is commonly called the "lunch hour treatment" (II App. 691).

E. The Historic EEOC Position On The Exclusion Of Pregnancy Coverage From Disability Insurance Plans

Although the current EEOC sex discrimination guideline relating to pregnancy and childbirth disability provides that pregnancy-caused disabilities should be covered by disability insurance plans (29 C.F.R. 1604.10), this has been the EEOC position only since April 1972. See 37 Fed. Reg. 6835. Prior to the latter date, and beginning in November 1965, the EEOC issued, and periodically amended, a series of guidelines on discrimination because of sex, but such guidelines were completely silent with respect to the treatment of disabilities resulting from pregnancy or childbirth. See 30 Fed. Reg. 14926; 33 Fed. Reg. 3344; and 34 Fed. Reg. 13367.

In 1966, the General Counsel of the EEOC, Charles Duncan (II App. 654-55), issued a series of opinion letters which stated: (1) that the EEOC did not regard pregnancy to be comparable to illness or injury; (2) that an employer need not provide the same fringe benefits for pregnancy as are provided

for illness; and (3) that a disability insurance benefit plan that excluded pregnancy coverage was not discriminatory (GE Exh. 12, II App. 732-36).[15]

Mr. Duncan testified in this case without contradiction: (1) that the letters reflected the official 1965-1966 EEOC policy and position arrived at after thorough discussion and consideration, including an inquiry into pertinent legislative history underlying Title VII; and (2) that, in the course of its 1965-1966 deliberations, the EEOC discussed and considered adopting a policy reflected in the current guideline on the treatment of pregnancy-caused disabilities under disability insurance plans, but deliberately rejected this alternative (II App. 656-57, 661-63, 664-65).[16]

One of the opinion letters issued by Mr. Duncan as EEOC General Counsel was dated October 17, 1966, was released by the EEOC on December 9, 1966, and was published in CCH Employment Practices Guide under date of December 21, 1966. It stated in part (II App. 720-22):

> You have requested our opinion whether the above exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of Title VII of the Civil Rights Act of 1964.
>
> In a recent opinion letter regarding pregnancy, we have stated, "The Commission policy in this area does not seek to compare an employer's

[15] The letters are quoted, in part, *infra*, pp. 42-43.

[16] Mr. Duncan's testimony is summarized at greater length, *infra*, pp. 43-44.

> treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees." Therefore, it is our opinion that according to the facts stated above, a company's group insurance program which covers hospital and medical expenses for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII.

CCH continued to publish this letter in Employment Practices Guide until May 1971 (II App. 590), with a summary of the letter being published on April 22, 1971 (GE Exh. 5, II App. 722).

F. GE's Determination That The Exclusion Of Pregnancy Was Lawful

After Title VII was enacted, GE's Labor Relations Counsel, Thomas F. Hilbert, Jr., undertook a review of GE's contracts and practices, including the pregnancy exclusion in its sickness and accident policy, to seek out "any potential problem" (II App. 586-87). He concluded that the exclusion did not violate Title VII, basing his conclusion on: (1) his reading of the October 17, 1966, letter of the EEOC General Counsel, *supra*, p. 14 (II App. 588); (2) prior acceptance of the exclusion by state agencies in the face of state anti-discrimination statutes (II App. 587); and (3) sex discrimination guidelines issued by Federal agencies other than the EEOC (II App. 590-91).

II. THE DISTRICT COURT'S OPINION

In holding that GE's failure to pay sickness and accident benefits to plaintiffs and the members of the class they represent for work absences due to pregnancy-related disabilities constitutes sex discrimination in violation of Title VII (Jt. Pet. 2a-38a), the district court found: (1) pregnancy, *per se*, is not a disease, and is "perhaps most often voluntary" (Jt. Pet. 20a); (2) the exclusion of pregnancy-related disabilities from coverage under GE's sickness and accident insurance coverage is "inextricably sex-linked" in that "it excludes from coverage a unique disability which affects only members of the female sex" (Jet. Pet. 29a, 31a); (3) the EEOC's construction of Title VII, as manifested in its 1972 sex guideline, "in the absence of evidence to the contrary" expressed the will of Congress (Jet. Pet. 28a);[17] and (4) the payment of pregnancy benefits would increase GE's sickness and accident costs by a large but "at this time" indeterminable amount (Jt. Pet. 23a), but that such increased costs were neither a relevant argument nor a defense to sex discrimination (Jt. Pet. 31a).

III. THE COURT OF APPEALS' OPINION

The majority of the court of appeals expressly adopted the EEOC's construction of Title VII and

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[17] In so finding, however, the district court's decision completely ignored the fact that the 1972 guideline constituted a reversal of the EEOC's long-standing prior construction of the statute; nor did the district court advert in any way to the testimony (see *supra*, p. 14) of Mr. Duncan, EEOC General Counsel during 1965-1966, explicating such prior construction.

held that the pregnancy exclusion from GE's disability insurance was "inextricably sex-linked" and consequently violative of Title VII (Supp. Br. Jt. Pet 4a). In the view of the majority, the holding in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), that disparity in treatment between pregnancy-related and other disabilities was not sex discrimination, was not controlling in this case (Supp. Br. Jt. Pet. 7a-11a). *Geduldig*, the majority stated, was decided under the equal protection clause of the Fourteenth Amendment and was, therefore, not applicable in a Title VII context (Supp. Br. Jt. Pet. 7a).

Judge Widener, in dissent, deemed the majority decision as precluded by this Court's opinion in *Geduldig*, which he regarded as written "not in a vacuum and not with self-imposed blinkers," but rather with "an eye to Title VII cases certain to come" (Supp. Br. Jt. Pet. 14a). Noting that in *Geduldig* the Court had stated, *inter alia*, that there was a lack of identity between the exclusion of pregnancy from a disability insurance plan and gender as such, he viewed *Geduldig* as holding that such an exclusion did not constitute sex discrimination (Supp. Jt. Pet. 13a). Such a non-discriminatory exclusion therefore, Judge Widener said, could "no more support a finding of discrimination under Title VII than under the equal protection clause," because the "test for validity under Title VII is not different from the test of validity under the fourteenth amendment" (Supp. Br. Jt. Pet. 13a). He further noted that the application of different tests for discrimination under Title VII and the equal protection clause was illogical and would generate inconsistent results (Supp. Br. Jt. Pet. 14a).

Concluding, Judge Widener stated that "Title VII seeks to equalize opportunity, not to create an advantage for either men or women. If Congress wishes to legislate in favor of pregnant women, I see no constitutional impediment. . . . But, I submit, Congress did not so undertake in Title VII" (Id.).

SUMMARY OF THE ARGUMENT

I.

A. The threshold inquiry in this case is whether the exclusion of pregnancy-related disabilities from coverage under a private employer's sickness and accident insurance plan for its employees constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964. *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), established that the question should be answered negatively. In *Geduldig*, the Court said that there is a "lack of identity" between gender and the exclusion of pregnancy from disability coverage, and held that a pregnancy exclusion from a state (California) disability insurance plan for the employees of private employers was not sex discrimination so long as the exclusion was not discriminatorily motivated. *Geduldig* further held that the pregnancy exclusion in California's plan did not violate the equal protection clause of the Fourteenth Amendment. In this latter connection, the Court noted the presence of a number of considerations which made California's plan rationally supportable, namely, that the plan was established "in accordance with insurance concepts," and that California was concerned with maintaining the fiscal integrity of its program and avoiding harmful cost consequences. The Court noted further that there was no record

evidence showing that the selection of the risks insured under the plan worked to discriminate against any definable group or class in terms of aggregate risk protection derived by that group or class from the program.

The majority of the court of appeals did not come to grips with the proposition, made clear in *Geduldig*, that there is a lack of identity between gender and the exclusion of pregnancy from disability coverage; instead, the majority summarily, and erroneously, dismissed *Geduldig* as a controlling precedent on the ground that *Geduldig* was a constitutional decision which was not decisive in the Title VII context here involved. However, as Judge Widener stated in his dissent below, because *Geduldig* established that the exclusion of pregnancy from disability insurance coverage for employees does not constitute discrimination on the basis of sex, it is irrelevant whether Title VII has a broader sweep than does the equal protection clause. Furthermore, as Judge Widener also stated, the test of validity with respect to sex discrimination is the same under both Title VII and the equal protection clause. There is, moreover, no language of limitation or reservation in *Geduldig*, a fact which indicates that this Court intended that the case should be read as controlling in the context of both the equal protection clause and Title VII. Finally, the decision of the majority of the court of appeals would bring about the incongruous result of allowing the exclusion of pregnancy under a state disability insurance plan for the employees of private employers, but would require the state to provide pregnancy coverage under a disability benefit plan for its own employees.

B. There is nothing either in Title VII's language or in its legislative history to support the view that it is unlawful to exclude pregnancy from disability insurance coverage. Thus there is an absence of specific legislative history underlying the sex discrimination prohibition provision contained in Title VII; moreover, what relevant legislative history there is with respect to Title VII indicates that such a pregnancy exclusion is not unlawful. Also relevant in the construction of Title VII is the Congressional legislative history underlying the proposed Equal Rights Amendment ("ERA") to the Constitution. That legislative history shows that the ERA would not prohibit a reasonable classification which relates to a physical characteristic unique to one sex. A pregnancy exclusion such as one on which this case centers would therefore be valid under the ERA, and, consequently, to treat it as sexually discriminatory under Title VII would be anomalous.

C. The majority of the court below erred in attaching weight to the EEOC's current guideline which requires that pregnancy-related disabilities be considered as such under temporary disability insurance plans. That guideline, issued in 1972, reversed the EEOC's previous policy and position which was first enunciated and issued in 1966, and which remained in effect thereafter until 1972. Charles Duncan, the EEOC's General Counsel in 1965-1966, testified in this case without contradiction that the EEOC's original position on the treatment of pregnancy-caused disabilities was arrived at by the Commission after thorough discussion and deliberation, in the course of which the Commission considered the legislative history undelying Title VII with respect to sex discrimination.

The EEOC's current guideline on pregnancy-related disabilities is not entitled to deference because: (1) it was issued seven years after Title VII and is, therefore, not a contemporaneous construction; (2) as shown, it is inconsistent with the previous, contemporary and thoroughly considered, EEOC policy; (3) it is directly contrary to the position of other federal agencies which have dealt with the identical subject matter; (4) it is not only unsupported by expressions of specific legislative intent relating to Title VII, but it is opposed by the relevant Congressional intent underlying the Equal Rights Amendment; and (5) there are, in the words of *Espinoza* v. *Farah Manufacturing Company*, 414 U.S. 86, 94-95 (1973), ". . . 'compelling indications' [that the guideline is] . . . wrong." Accordingly, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), is not a dispositive precedent in this case. *Griggs* accorded "great deference" to the EEOC guidelines dealing with *racial* (as distinguished from *sexual*) discrimination, but only after a thorough review of the legislative history underlying Title VII's race discrimination prohibition—a history which clearly supported the EEOC's constructon. By contrast, no such comparable legislative history underlies Title VII's sex discrimination prohibition.

II.

The objective of Title VII, as made plain in *Griggs*, *supra*, is to eliminate practices, procedures, and policies which deny individuals job or promotion opportunities because of their race, sex, religion, or nationality. Less significant, under Title VII are other matters, like employee benefits, which relate,

not to job or promotion opportunities, but rather to the incidents of the job. Title VII's sex discrimination prohibition must be realistically interpreted, and the interpretation must recognize the distinction between job and promotion opportunities, on the one hand, and job incidents, on the other. The distinction is one of degree—especially so in this case which involves only one aspect of the many insurance benefits that GE provides for its employees. *Geduldig, supra*, implicitly recognized these principles in upholding the legality of the pregnancy exclusion there involved on the ground that the state had demonstrated, on the basis of cost and other considerations, that the exclusion was rationally supportable. As in *Geduldig*, there are sound business considerations that justify and rationally support GE's pregnancy exclusion.

A. Employers (and unions) seek to achieve a balanced benefits package, and to utilize benefits dollars in the best way to satisfy overall employee needs. One reason for GE's decision to exclude pregnancy is that the payment of a pregnancy benefit would not be a rational and prudent use of benefits money. Weekly sickness and accident insurance is intended to soften the blow to employees of an unintended sickness or accident; pregnancy, however, is a voluntarily induced and maintained condition which is not a sickness, and therefore the payment of a pregnancy benefit would not satisfy the purpose of the insurance. The payment of a pregnancy disability benefit would be at odds with GE's objective of using benefits money rationally and prudently for these additional reasons: (1) a pregnancy benefit would be particularly subject to abuse because of

the mother's concern for her fetus and her newborn child; (2) as approximately 40 percent of GE's female employees who have babies do not return to work, a pregnancy benefit would be tantamount to a grant of severance pay to such employees; (3) the payment of a pregnancy benefit would be likely to cause a demand for paid childcare leave for male employees, and would further accentuate an existing imbalance in favor of GE's female employees (compared to male employees) in the receipt of sickness and accident benefits; and (4) the non-payment of a pregnancy benefit adversely affects only a relatively small number of GE's female employees, whereas its payment would disadvantage the larger number of female employees.

Another important consideration underlying GE's pregnancy exclusion is the fact that GE's insurance plan follows standard insurance practice which, for the most part, does not cover pregnancy under sickness and accident insurance. Under such insurance, even where no pregnancy benefit is provided, the cost per unit of benefit for a female employee is considerably greater than that for a male employee; were a full pregnancy benefit to be provided, the cost for the female benefit would be 300-330 percent of that for the male benefit. The annual cost, in 1973, of adding maternity benefits to the disability insurance plans then in effect in the United States was $1,353,000,000.

Because GE has followed insurance practice and concepts in excluding pregnancy, and because it has sought to distribute its available benefits money in an equitable manner between its male and female

employees, GE's pregnancy exclusion is "rationally supportable" under *Geduldig*—a case which, in the context of a pregnancy exclusion, expressly recognized the relevancy of insurance concepts, "costs," and the rational distribution of "available resources" out of which disability benefits are paid. In sum, GE's pregnancy exclusion is entirely justifiable on the basis of important reasons relating to the operations of GE's business and the benefits package it provides to all its employees.

B. As stated, GE's decision to exclude pregnancy-related disabilities from coverage under its sickness and accident plan resulted from a careful weighing of crucial business considerations. That such considerations were present and underlay its actions shows that GE did not adopt its pregnancy exclusion "as a mere pretext designed to effect an invidious discrimination against" its female employees. *Geduldig, supra.* The absence of pretextual motivation is further shown by the fact that GE considered and relied upon validating governmental interpretations (state and federal) when it decided, after the enactment of Title VII, that its pregnancy exclusion was lawful.

III.

GE's sickness and accident insurance covers disabilities from non-occupational sickness and accidents. Thus, for the insurance to apply to pregnancy, the condition must be shown to be the result of either a sickness or an accident. The medical evidence shows, however, and the district court so found, that pregnancy is not a sickness. Nor is the matter of so-called pregnancy complications an important consideration; this is a *de minimis* matter since only between 1/10 and 3/10 of one percent of the women who become pregnant have major complications which require hospital treatment. Accordingly, insofar as the sickness aspect of GE's insurance is concerned, the pregnancy exclusion is justifiable.

The medical evidence also shows that pregnancy is a voluntarily induced condition which can either be avoided or terminated through abortion. Thus it cannot be contended plausibly that pregnancy is a condition caused by an accident.

The majority of the court of appeals erred in rejecting GE's "voluntarism" defense on the ground that GE had not eliminated from disability insurance coverage all so-called voluntary disabilities. In likening pregnancy to injuries resulting from athletic competition and to disabilities arising from attempted suicides, the courts below made an ill-conceived comparison, for pregnancy is a happy event and a desirable condition. Furthermore, and contrary to the majority of the court of appeals, it is not material that GE's disability insurance covers cosmetic surgery, because such surgery is a "*de minimis* problem" which rarely occurs.

ARGUMENT

I. THE EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM COVERAGE UNDER AN EMPLOYEE DISABILITY INCOME PROTECTION PLAN DOES NOT CONSTITUTE SEX DISCRIMINATION.

A. This Case Is Controlled By The Court's Holding In *Geduldig* v. *Aiello.*

The threshold inquiry in this case must be whether GE's pregnancy exclusion constitutes unlawful sex discrimination. As Judge Widener stated in his dissent below (Supp. Br. Jt. Pet. 12a):

> The inquiry in this case must therefore focus initially on whether the exclusion of pregnancy related disability from the disability benefits plan is sex discrimination. If it is not sex discrimination, then, regardless of what test is applied, there is no Title VII violation.

What was said in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), concerning the exclusion of pregnancy from a disability insurance plan is germane to the threshold inquiry herein and, we respectfully assert, is dispositive of the question now before the Court.

In *Geduldig*, the Court held that the exclusion of disabilities attributable to normal pregnancies from coverage under a state (California) disability insurance program was not discrimination violative of the equal protection clause of the Fourteenth Amendment. The state program covered persons in private employment. The Court noted that California intended to establish its insurance program "in accordance with insurance concepts" (417 U.S. at 492), that other disabilities in addition to pregnancy were excluded from coverage (417 U.S. at 488, 494-95),[18] and that to cover the excluded risks would be "substantially more costly" (417 U.S. at 495).[19] The exclusion of pregnancy-related disabilities from disability insurance benefits coverage was not "invidious discrimination," the Court said (417 U.S. at 494), but was, instead, "rationally supportable" (417 U.S. at 495). California, the Court noted, had legitimate interests in maintaining the fiscal integrity of its program which was self-supporting and which distributed its resources so as adequately to cover all included disabilities "rather than to cover all disabilities inadequately" (417 U.S. at 496). Similarly, it was proper for California to be concerned with maintaining the contribution rate at a level that would not unduly burden

[18] The California insurance plan does not pay disability benefits until the eighth day of disability, unless an employee is hospitalized, in which case benefits commence on the first day of hospitalization; the plan does not pay benefits for more than 26 weeks for any one disability (417 U.S. at 488). GE's sickness and accident insurance plan, here involved, had similar exclusions: "Benefits will start with the eighth day you are totally disabled (or with the first day of your confinement in a hospital as a bed patient, if earlier) and will continue during your total disability up to a maximum of 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related cause or causes" (III App. 1062-63).

[19] It was noted in *Geduldig* that the parties disagreed with respect to the magnitude of the increased costs of providing a pregnancy benefit, but the Court found that "they would clearly be substantial" (417 U.S. at 493-94). Similarly, the district court in this case found that the payment of pregnancy benefits would increase GE's costs by a large but "at this time" indeterminable amount (Jt. Pet. 23a).

participating employees (Id.). Thus the policy considerations underlying California's pregnancy exclusion constituted an "objective and wholly noninvidious basis for the State's decision not to create a more comprehensive program than it has" (Id.). The Court stated (417 U.S. 496-97):

> There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of aggregate risk protection derived by that group or class from the program. *There is no risk from which men are protected and women are not. Likewise there is no risk from which women are protected and men are not* [Emphasis supplied; footnotes omitted].[20]

The dissenting opinion in *Geduldig* expressed the view that the state's action constituted sex discrimination, *per se*. Noting that the state paid benefits for disabilities (prostatectomies, circumcision, hemophilia, and gout) that affect "only or primarily" men (417 U.S. at 501), the dissent stated that the state had, by excluding pregnancy from disability coverage, "singl[ed] out" for less favorable treatment "a

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[20] In this context, the Court pointed out that data submitted by the State "indicated that both the annual claim rate and the annual claim cost are greater for women than for men," and expressly noted that: " Several *amici curiae* have represented to the Court that they have had a similar experience under private disability programs" (417 U.S. at 497, n. 21).

GE submitted an *amicus* brief to this Court in *Geduldig*, in which (p. 24) it set forth, *inter alia*, its, and the insurance industry's, experience with respect to the relative costs of providing disability benefits for female and male employees. See, *supra*, n. 5 and p. 8.

gender-linked disability peculiar to women" (Id.). "Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex," the dissenting opinion declared, "inevitably constitutes sex discrimination" (Id.).

However, the dissenting view that the state's action involved *per se* sex discrimination was expressly rejected by the majority of the Court (417 U.S. at 496-97, n. 20):

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71, and *Frontiero* v. *Richardson*, 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory

analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[21]

The majority of the court of appeals did not come to grips with the proposition, made clear in *Geduldig*, that there is a lack of identity between gender and the exclusion of pregnancy from disability coverage. The conceptual, and controlling, dichotomy thus formulated in *Geduldig* cannot be blotted out, moreover, as the majority below sought to do (Supp. Br. Jt. Pet.

[21] *Frontiero* and *Reed* defined sex discrimination as "dissimilar treatment for men and women who are . . . similarly situated" (404 U.S. at 77, 411 U.S. at 688, respectively)—a definition consistent with the Court's analysis of sex discrimination under Title VII. See, *Phillips* v. *Martin Marietta Corporation*, 400 U.S. 542, 544 (1971), wherein this Court stated that Title VII "requires that *persons of like qualifications* be given employment opportunities irrespective of their sex" [Emphasis supplied]. In concluding in *Geduldig* that a pregnancy disability exclusion was not sex discrimination so long as it was not discriminatorily motivated, the Court was in effect recognizing that with respect to pregnancy men and women are not "similarly situated" and do not have "like qualifications." Thus *Geduldig* is consistent with the Court's pronouncements in the earlier sex discrimination cases—a consistency pointed out by Professor Larson, former Under Secretary of Labor, in "Sex Discrimination As To Maternity Benefits," 1975 Duke L.J. 805, 811 (1975) (hereinafter cited as "1975 Duke L.J."): "The assertion in *Geduldig* that pregnancy-based discrimination is not gender-based discrimination is not casual dictum. It is an essential link in the chain of argument disassociating *Geduldig* from cases 'based upon gender as such,' such as *Reed* and *Frontiero* . . . ."

7a, 9a),[22] merely by referencing the fact that *Geduldig* involved a constitutional attack on a legislative program, and not a Title VII claim of sex discrimination. Nor, clearly, was the majority below correct in stating that the only point of difference between the majority and dissenting opinions in *Geduldig* was in identifying the standard to be used in testing gender-based classifications—i.e., whether the "rationally supportable" test or the "strict scrutiny" test should be applied (Supp. Br. Jt. Pet. 8a, n. 17).

As Judge Widener noted in his dissent below (Supp. Br. Jet. Pet. 12a-13a), because *Geduldig* establishes that a pregnancy exclusion is not sex discrimination, it is irrelevant whether or not Title VII has a broader sweep than does the equal protection clause.[23] Further, as Judge Widener also stated

[22] Other courts of appeals have similarly, but erroneously, distinguished *Geduldig*. See, e.g., *Satty* v. *Nashville Gas Co.*, —— F.2d ——, 11 FEP Cases 1, 3 (6th Cir. 1975) ("It is apparent from our reading of footnote 20 that the Court's observations are made in the particular and narrow confines of the state's power to draw flexible and pragmatic lines in the social welfare area."); *Wetzel* v. *Liberty Mutual Insurance Company*, 511 F.2d 199, 203 (3d Cir. 1975) (". . . our case is one of statutory interpretation rather than one of constitutional analysis. On this distinction alone we believe appellant's reliance on Aiello is misplaced.") See also, *Hutchison* v. *Lake Oswego School District No. 7*, 519 F.2d 961, 963 (9th Cir. 1975) (Schnacke, J., dissenting on the ground that Title VII was not violated); *Communications Workers of America, AFL-CIO* v. *American Telephone and Telegraph Co., Long Lines Department*, 513 F.2d 1024 (2d Cir. 1975).

[23] The same point was made by District Judge Knapp in *Communications Workers of America, AFL-CIO* v. *American Telephone and Telegraph Co., Long Lines Department*, 379 F.

(Supp. Br. Jt. Pet. 13a), ". . . the test of validity under Title VII is not different from the test of

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Supp. 679 (S.D. N.Y. 1974), *rev'd*, 513 F.2d 1024 (2d Cir. 1975), a suit involving the same issue as presented by this case. To the argument that *Geduldig* is distinguishable on the ground that deference is to be accorded under the Fourteenth Amendment to state legislative judgments on social welfare matters, but that no such deference is warranted under Title VII to allegedly discriminatory employer action, Judge Knapp responded (379 F. Supp. at 682):

> The flaw in this argument is that it begs the question. The threshold question is whether disparity of treatment between pregnancy related disabilities and other disabilities can be classified as discrimination because of sex (or gender). If, as footnote 20 [of *Geduldig*] seems to suggest, it cannot be so classified, then the further question of whether such disparity is justified—or less justifiable in the employment context than in some other context—can never be reached.
>
> In other words, if the [*Geduldig*] Court had found that the California scheme did discriminate on the grounds of sex (or gender) but must nevertheless be upheld because of the deference due to California's sovereign right to make choices in methods of providing social welfare, the holding would clearly be inapplicable to a case arising under Title VII where no such deference is required. But such, as we read it, was not the holding of the Court. The holding was that California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). *Such a holding precludes relief under Title VII even more clearly than under the Fourteenth Amendment.* Under the Amendment it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII, which deals only with discrimination "because of . . . sex" 42 U.S.C. § 2000e(2) (a) (1) [Emphasis supplied].

validity under the Fourteenth Amendment" (*U.S.* v. *Chesterfield County School District*, 484 F.2d 70, 73 (4th Cir. 1973)). See also, *Davis* v. *Washington*, 512 F.2d 956, 958 n. 2 (D.C. Cir. 1975) ("The many decisions disposing of employment discrimination claims on constitutional grounds have made no distinction between the constitutional standard and the statutory standard under Title VII."); *Castro* v. *Beecher*, 459 F.2d 725, 732-33 (1st Cir. 1972); *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1176-77 (2d Cir. 1972); *Western Addition Community Organization* v. *Alioto*, 340 F. Supp. 1351, 1353 (N.D. Cal. 1972); *Shield Club* v. *City of Cleveland*, 370 F. Supp. 251, 253-54 (N.D. Ohio 1972).[24]

Not to apply *Geduldig* in the context of Title VII, moreover, would lead to incongruous results, one of which was thus pointed out by Judge Widener (Supp. Br. Jt. Pet. 14a):

> . . . a state's disability benefit plan for its own employees covered by Title VII, 42 USC § 2000e (b), would, under our holding, not be allowed to exclude pregnancy from its coverage. However, such an exclusion could be made freely in a state plan for employees of private employers such as that in *Geduldig*. I fail to see the justification for the inconsistency.

Finally, the absence of any language of reservation or limitation in *Geduldig*, confining footnote 20 of the Court's opinion to an equal protection context,

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[24] See also *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974), holding that the substantive proscription against discrimination contained in Title VII is no broader than that found in anti-discrimination Executive Orders.

persuasively suggests, we submit, that the Court intended that its conclusion in *Geduldig* with respect to sex discrimination should be read as controlling in the context of both the equal protection clause and Title VII.[25]

B. Neither The Language Of Title VII Nor Pertinent Legislative History Supports The View That The Failure To Cover Pregnancy Is Unlawful.

Title VII of the Civil Rights Act of 1964, as amended in 1972, prohibits most private and public employers from discriminating against any individual in his employment, or from otherwise treating an employee adversely or unfairly, "because of [the] individual's . . . sex" (42 U.S.C. 2000e-2(a)), except "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" (42 U.S.C. 2000e-2(e)(1)). No-

[25] The majority below also viewed "the consequences" of GE's pregnancy exclusion as violative of Title VII (Supp. Br. Jt. Pet. 4a). The majority's reliance in this context on *Griggs, supra,* a case involving racial discrimination, is, however, misplaced. In *Griggs,* the Court emphasized the explicit and plenary legislative history underlying Title VII's prohibition against racial discrimination. See, e.g., 401 U.S. at 434-36. However, as explained *infra,* pp. 35-41, no comparable history underlies Title VII's sex discrimination prohibition, and, indeed, the legislative history underlying the proposed Equal Rights Amendment indicates that the "race" analogy is inapposite here. The *Griggs* analogy is even less persuasive, moreover, when it is recognized that the Court, in contrast to its treatment of race, has been reluctant to treat sex as a suspect classification. See, e.g., *Frontiero* v. *Richardson,* 411 U.S. 677 (1973); *Kahn* v. *Shevin,* 416 U.S. 351 (1974); *Schlesinger* v. *Ballard,* —— U.S. ——, 41 L.Ed.2d 610 (1975).

where in the Act is there any indication of what is meant by the term "discriminating;" and, of course, there is no specific reference in Title VII to pregnancy, much less to a pregnancy exclusion in the disability insurance context.

There is, moreover, nothing in the legislative history underlying Title VII's sex discrimination prohibition that impels a finding that the pregnancy exclusion here in issue is unlawful. If anything, we submit, the legislative history shows that such exclusion is lawful. The amendment prohibiting sex discrimination was first offered by Congressman Smith (D., Va.), probably in an attempt to defeat the passage of the bill.[26] In fact, several of the leading proponents of the bill spoke in opposition to the amendment.[27]

The amendment was proposed on the House floor and quickly adopted after hasty debate covering only nine pages of the Congressional Record.[28] Every male member of the House voicing support for the inclu-

[26] 110 Cong. Rec. 2577 (1964); see also Comment, Civil Rights Act of 1964: *An Exception To Prohibitions on Employment Discrimination,* 55 Iowa L. Rev. 509, 511 (1969); Note: *Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964,* 1968 Duke L.J. 671, 676 n.35 (hereinafter cited as "1968 Duke L. J.").

[27] 110 Cong. Rec. 2577-2584 (1964). Among those speaking in opposition to the amendment were Representatives Celler (D. N.Y.), Chairman of the House Committee on the Judiciary, Roosevelt (D., Cal.), Green (D., Ore.), and Lindsey (R., N.Y.).

[28] Id.

sion of the amendment ultimately voted against the civil rights bill.[29]

In the Senate, Senator Humphrey, the effective manager of the pending Senate bill, explained that the Bennett Amendment[30] to the Senate bill (now part of Sec. 703(h) of Title VII, 42 U.S.C. Sec. 2000e-2(h)), the purpose of which was to avoid conflicts between the sex discrimination prohibition and the Equal Pay Act, made it "unmistakably clear" that despite the latter prohibition "*differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill if it becomes law*" [Emphasis supplied].[31] Senator Humphrey's statement shows, we submit, that the Senate, at least, did not take the simplistic view that the sex discrimination prohibition must be applied automatically against any employer action which affects male and female employees differently.

In sum, the legislative history underlying Title VII's sex discrimination prohibition is silent with respect not only to the specific point at issue in this case, but indeed with respect to the overall matter of pregnancy itself. Judge Widener thus addressed the matter (Supp. Br. Jt. Pet. 14a): "If Congress wishes to legislate in favor of pregnant women, I see no con-

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[29] 110 Cong. Rec. 15897 (1964). See also 55 Iowa L. Rev. at 512; 1968 Duke L.J. at 677.

[30] 110 Cong. Rec. 13647 (1964).

[31] 110 Cong. Rec. 13663-4 (1964).

stitutional impediment . . . . But, I submit Congress did not so undertake in Title VII." [32]

The subsequent Congressional legislative history underlying the proposed Equal Rights Amendment to the Constitution ("ERA")[33] provides insight and is entitled to weight in determining the meaning of the earlier-enacted Title VII. See *Glidden Company* v. *Zdanok*, 370 U.S. 530, 541 (1962); *F.H.A.* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958).[34] Fourteen

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[32] To the same effect, see 1975 Duke L.J. at 822-23 in response to the argument that Title VII is a more specific Congressional mandate to combat sex and race discrimination than the broad mandate of the equal protection clause of the Fourteenth Amendment:

> What counts is what Title VII in fact provides. In simplest terms, it forbids unequal treatment of the sexes as to employment, including its compensation, terms, and conditions. So does the fourteenth amendment. In each case, the key concept is equality. . . . Presumably Congress, at least under the commerce power, could expressly require employers to provide normal maternity benefits if they provide any injury or illness benefits whatsoever. *What is missing here is any proof that Congress did so in Title VII* [Emphasis added].

[33] As approved by the Congress, the ERA provides:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.
>
> Section 3. This Amendment shall take effect two years after the date of ratification.

[34] Indeed, the legislative history of the ERA was brought to the Court's attention in *Geduldig*. See GE's *amicus* brief, pp. 31-38.

of the members of the House Committee on the Judiciary who supported the original version of H. J. Res. 208, the version of the ERA ultimately approved by both houses of Congress, stated as their Separate Views on H. J. Res. 208: [35]

> The legal principle underlying the Equal Rights amendment as proposed by Mrs. Griffiths [Rep. Martha Griffiths of Michigan] is that the law must deal with the individual attributes of the particular person and not with stereotypes or over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. "Equality" does not mean "sameness". *As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of child bearing could only apply to women.* In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative [Emphasis added].

The majority Report of the Senate Committee on the Judiciary with regard to the ERA specifically approved this statement from H.R. Rep. No. 92-359.[36]

In her testimony before the House Sub-committee considering the proposed amendment, Rep. Griffiths explained what the amendment would *not* do: [37]

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[35] H.R. Rep. No. 92-359, 92nd Cong., 1st Sess. 7 (1971).

[36] S. Rep. No. 92-689, 92nd Cong., 2nd Sess. 11 (1972).

[37] Hearings on H. J. Res. 35,208 and Related Bills, and H. R. 916 and Related Bills before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92nd Cong., 1st Sess., 40 (1971). (Hereinafter cited as "ERA House Hearings.") To the same effect see testimony of Betty Friedan, founder of National Organization for Women, Hearings on S. J. Res. 61 before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, U.S. Senate, 91st Cong., 2d Sess. 493 (1970).

> Like private action, governmental action dealing with a physical characteristic unique to one sex would not be affected by the equal rights amendment. Where a law deals with a physical characteristic unique to one sex, equality between the sexes could not be achieved, for such a law could not apply in practice to both sexes. Therefore, the equal rights amendment would not affect laws dealing with a physical characteristic unique to one sex, such as laws governing childbearing, sperm donation, or criminal acts capable of being committed by members of only one sex.[38]

Representative Bella Abzug testified that the Amendment would not prevent sex-based distinctions "where the law could not possibly apply to both sexes." [39] Similarly, during the House debate, Representative William Ryan pointed out that "The basic principle underlying the equal rights amendment . . . does not

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[38] In response to questioning on whether the ERA would prohibit all classifications taking account of sex, Representative Griffiths said: "But you would have to have some distinction in laws that apply to mothers, to pregnant women, because men aren't pregnant. You don't have to have the same law applying because of different functions of the body. The bodies are not exactly the same, so there could be a difference." ERA House Hearings 51.

[39] ERA House Hearings 116.

preclude legitimate differentation [sic] based on the unique physical characteristics of the sexes." [40]

The most comprehensive analysis of the limits on the scope of the proposed ERA was presented to both the Senate [41] and House committees by Thomas I. Emerson, Lines Professor of Law, Yale Law School.[42] Professor Emerson testified before the Senate Judiciary Committee: [43]

> The fundamental legal principle underlying the equal rights amendment, then, is that the law must deal with the individual attributes of the particular person, not with a vast over-classification based upon the irrelevant factor of sex. It should be noted at this point that there is one type of situation where the law may focus on a sexual characteristic but the basic principle just stated has no application.
>
> This occurs where the legal system deals directly with a physical characteristic that is unique to one sex. In this situation it could be said that,

[40] 117 Cong. Rec. 35791 (1971). To the same effect, see remarks of Representative Drinan, *id.* at 35797; Representative Mitchell, *id.* at 35801; Representative Broyhill, *id.* at 35806; and Senator Gurney, 118 Cong. Rec. 9335 (1972).

[41] Hearings on S.J. Res. 61 and S.J. Res. 231 before the Committee on Judiciary, U.S. Senate, 91st Cong., 2d Sess. 430, n.7 (1970). (Hereinafter cited as "ERA Senate Judiciary Committee Hearings.")

[42] Professor Emerson was the successful counsel who prepared the brief and argued the precedent-making case, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), involving the important issue of the right to privacy.

[43] ERA Senate Judiciary Committee Hearings 298-99.

> in a certain sense, the individual obtains a benefit or is subject to a restriction, because he or she belongs to one or the other sex.
>
> Thus a law providing for payment of the medical costs of childbearing would cover only women, and a law relating to sperm banks would restrict only men. Such legislation cannot be said to deny equal rights to the other sex. There is no basis here for seeking or achieving equality.[44]

As shown by the foregoing analysis of the concept of sex discrimination under the ERA, the pregnancy exclusion on which the instant case centers, just as that in *Geduldig*, cannot be regarded as discriminatory on the basis of sex. Accordingly, if even the ERA would not treat such an exclusion as sexually discriminatory, it would be anomalous in the extreme to regard it as a sex discrimination violation under Title VII. The legislative history of ERA in this respect should be looked upon as the controlling substitute for the comparatively barren legislative history of Title VII on sex discrimination.

[44] In testimony before the House Subcommittee Professor Emerson said (ERA House Hearings 402):

> . . . the equal rights amendment does not preclude legislation, or other official action, which relates to a physical characteristic unique to one sex. . . . So long as the characteristics [sic] is found in all women and no men, or all men and no women, the law does not violate the basic principle of the equal rights amendment; for it raises no problem of ignoring individual characteristics in favor of a prevailing group characteristic or an average.

C. The EEOC's Sex Discrimination Guideline Concerning Employment Policies Relating To Pregnancy And Childbirth Is Not Entitled To Judicial Deference.

1. *The EEOC's "Waffling" Position*

Guidelines on Discrimination Because of Sex were originally issued by the EEOC on November 24, 1965 (30 Fed. Reg. 14926); they were amended by the EEOC on February 21, 1968 (33 Fed. Reg. 3344); were again amended on August 19, 1969 (34 Fed. Reg. 13367); and were last amended and revised effective April 5, 1972 (37 Fed. Reg. 6835). Until 1972, the guidelines expressed no view with respect to the way disabilities resulting from pregnancy or childbirth were to be treated.[45]

The first public expression by the EEOC on the treatment of pregnancy under Title VII appeared in a series of opinion letters issued by the EEOC's General Counsel in 1966. The EEOC's position as to whether pregnancy was to be treated as an illness was thus set forth:

> The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary

[45] In pertinent part the present guideline states (29 C.F.R. 1604.10): "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment." 29 C.F.R. 1604.10. The full text of the present guideline is set forth in the Appendix hereto.

> disability unique to the female sex and more or less to be anticipated during the working life of most women employees. . . . we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness. . . .[46]

The EEOC's position on the specific question of whether pregnancy need be covered under a disability insurance benefit plan was also set forth:

> . . . an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory.[47]

Charles Duncan, EEOC General Counsel in 1965 and 1966, testified in this case without contradiction that the quoted statements from the 1966 letters reflected official EEOC policy during his incumbency

[46] Excerpt from an EEOC opinion letter dated November 15, 1966 (GE Exh. 12, II App. 736), which was identified by witness Charles Duncan as similar to letters prepared in his office and sent out by him during his incumbency as EEOC General Counsel during 1965-1966, the contents of the letters having been authorized by Mr. Duncan and the Commission (II App. 656-57).

[47] Excerpt from an EEOC opinion letter dated November 10, 1966 (GE Exh. 12, II App. 732-35), also identified by Mr. Duncan as similar in content to others he sent out during his incumbency as EEOC General Counsel. See note 46, *supra*. The November 10, 1966, letter states expressly: "This is an opinion letter issued pursuant to 29 C.F.R. 1601.30."

See also GE Exhibit 4 (II App. 720), which is a CCH reproduction of an EEOC opinion letter dated October 17, 1966, concerning the legitimacy of excluding pregnancy from disability insurance coverage. The letter is referred to *supra*, pp. 14-15.

as General Counsel (II App. 655, 661). Mr. Duncan further testified: (1) during the first year of the EEOC's existence—i.e., the year beginning July 2, 1965—questions and problems respecting sex discrimination "occupied a good deal of the Commission's attention" and "were thoroughly discussed by the Commission," and, during the same period, the treatment of pregnancy disabilities under an employer's disability insurance plan was specifically considered by the full Commission; (2) in formulating its 1965-1966 policy, the Commission considered and inquired into the legislative history underlying Title VII with respect to sex discrimination; (3) the Commission's 1965-1966 policy and position was that pregnancy could be treated differently from "medical illness," and that under an employer-sponsored employee disability insurance plan it was not necessary "to provide the same benefits for maternity absence [as] for illness-caused absence;" and (4) in the course of its 1965-1966 deliberations on sex discrimination, the Commission "extensively considered" and discussed as a possible alternative the policy reflected in the current EEOC guidelines with respect to the treatment of pregnancy-caused disabilities under employee disability insurance plans, considering such a policy in the light of the legislative history underlying Title VII, but consciously and deliberately rejecting it (II App. 656, 657-58, 660-63, 664-65).

The EEOC policy and position described by Mr. Duncan is reflected in the EEOC's First Annual Report for the fiscal year ending June 30, 1966 (sent to Congress on March 1, 1967), wherein it was said (p. 40): "The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely . . . ." It is further reflected in a Commission Decision (No. 70-360) issued on December 16, 1969, which states in part: "The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex. . . ." The 1969 Decision is reproduced in CCH EEOC Decisions ¶ 6084.[48]

Not only is the current EEOC guideline a reversal of the prior interpretation of the statute by the EEOC, but it also contradicts the position of other federal agencies. Thus, the Sex Discrimination Guidelines promulgated by the Secretary of Labor pursuant to Executive Order 11246 (3 C.F.R. 173)[49]

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[48] See also the following excerpt from a speech delivered to the Industrial Relations Research Association, Washington, D.C., Chapter by Sonia Pressman, then Senior Attorney, Office of the General Counsel, EEOC, on April 16, 1969, stating the EEOC's then position to be as follows: "The Commission . . . has not to date equated [pregnancy] with sickness. Thus, the Commission has ruled . . . that an employer may have a medical and hospital insurance plan which covers the expenses of delivery, but excludes disabilities related to pregnancy, childbirth, miscarriage, and abortion." CCH Employment Practices Guide ¶ 8004 at p. 6005 (June 19, 1969).

[49] Executive Order 11246 is a Presidential order which prohibits government contractors and subcontractors from dis-

do not require that employee medical benefit plans cover pregnancy related disabilities as long as an employer makes equal contributions to such plans for employees of both sexes (41 C.F.R. § 60-20-3(c)).[50] Moreover, regulations promulgated by the Wage and Hour Administrator under the Equal Pay Act, 29 U.S.C. 206(d), provide that payments relating to maternity are not wages for purposes of that statute (29 C.F.R. § 800.110), and further state (29 C.F.R. § 800.116(d)):

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other.[51]

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criminating in employment on the basis of race, color, religion, sex, or national origin. "Sex" as a prohibited type of discrimination was added to the order by a 1967 amendment (32 Fed. Reg. 14303). This Executive Order applies to all GE locations and all GE employees in the United States.

[50] On December 27, 1973, the Secretary of Labor published in the Federal Register (38 Fed. Reg. 35336) proposed revisions in the Guidelines which, *inter alia*, proposed that "medically verifiable disabilities which are related to pregnancy be treated as temporary disabilities." The Secretary went on to state: "The OFCC, however, recognizes the need to continue to be guided by pertinent judicial decisions, including those expected to be rendered by the United States Supreme Court during this present term." The views of interested parties were solicited, but hearings on the proposed revision have not yet been held or announced, and the Guidelines have continued in their original form.

[51] In its First Annual Report, see *supra*, p. 44, the EEOC said (pp. 41-42): ". . . an employer does not commit an unlawful employment practice by contributing to or negotiating accident insurance programs which provide different benefits for male and female employees based upon reasonable actuarial considerations, as long as the cost to the employer is the same for both groups of employees. Similarly, no violation occurs when male and female employees receive the same benefits but the employer's contribution to the plan differs according to the sex of the employee."

The EEOC, moreover, has *not* been consistent in its application of the 1972 guideline on employment policies relating to pregnancy and childbirth. This is revealed in Federal Communications Commission rate increase proceedings involving American Telephone & Telegraph Company and 24 of its associated operating companies ("Bell Companies"), FCC Case No. 19143, in which the EEOC participated as a petitioner in opposition to AT&T and the Bell Companies. The Companies provide their employees with up to 52 weeks of benefits because of absences from work due to physical disabilities caused by sickness, but exclude from benefit eligibility female employees on maternity leave who experience normal pregnancies (GE Exhs. 27, 28; III App. 761-64, 764, 769-71; I App. 192-93). Yet, on January 18, 1973, after extensive negotiations, the EEOC, the Department of Labor, and AT&T on behalf of itself and the Bell Companies, signed an Agreement providing, *inter alia*, for the entry of a consent decree in a district court, the resolution and discontinuance of all pending litigation concerning compliance by AT&T and the Bell Companies with all laws and regulations concerning equal employment opportunity, and the dismissal of the EEOC opposition to the proposed rate increases in the FCC proceedings. Although this Agreement provides that adherence to its terms

constitutes full compliance with all laws and regulations governing equal employment opportunity, it imposes no obligation on AT&T or the Bell Companies to discontinue their current policy and practice of not paying sickness benefits to their female employees who are absent from work as the result of normal pregnancies (GE Exhs. 33, 34; III App. 795-822, I App. 192-93).[52]

2. *The Controlling Legal Principles*

It is settled law that administrative interpretations which have not been consistently adhered to, and which are not contemporaneous with the enactment of a law, are not entitled to the judicial deference normally accorded agency interpretations. See, e.g., *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *Udall* v. *Tallman*, 380 U.S. 1, 16-23 (1965); *F.T.C.* v. *Jantzen, Inc.*, 356 F.2d 253 (9th Cir. 1966),[53] *rev'd on other grounds*, 386 U.S. 228 (1967).

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[52] A recent instance of the EEOC's inconsistent position with respect to pregnancy-related disabilities is found in an EEOC Conciliation Agreement involving a private law firm. This post-February 6, 1974, agreement provides, *inter alia*, that, while pregnancy complications are to be "treated as other temporary disabilities for sick leave purposes," normal pregnancies will only receive a flat "paid maternity leave of six weeks." See CCH Employment Practices Guide ¶ 5350 at 3709.

[53] "[W]e owe little, if any, deference to the Commission's views as to what the statute does. A consistent interpretation of a statute by the body created to administer it is indeed entitled to judicial respect. But it goes beyond all reason to apply the same rule to diametrically inconsistent positions taken by such a body. If we owe any deference to the Commission's views, it is to those that were contemporaneous with the enactment of the statute . . . ." (356 F.2d at 254, n. 4).

See also, *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), rejecting an EEOC guideline equating discrimination on the basis of citizenship with the Title VII proscription against discriminaton on the basis of national origin because: (1) the guideline position was contrary to the Congressional understanding of the term "national origin," as shown by, among other things, Congressional enactments in related areas (". . . deference [to the EEOC guideline] must have limits where, as here, application of the guideline would be inconsistent with an obvious Congressional intent not to reach the employment practice in question," 414 U.S. at 94); (2) the guideline position was inconsistent with a "general understanding" of the term's meaning, as shown by federal regulations and the statutes of various states (414 U.S. at 88, n. 2); and (3) the guideline position was contrary to an earlier Commission position expressed "through its General Counsel" (414 U.S. at 94).[54]

Espinoza, therefore, parallels this case and is here applicable because: (1) the 1972 EEOC guideline on pregnancy and childbirth is contrary to Congress's understanding of what is meant by sex discrimination (see *supra*, pp. 35-41); and (2) the 1972 guideline completely reverses the EEOC's earlier position,

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[54] When the *Espinoza* case was before the court of appeals, the Seventh Circuit likewise refused to follow the EEOC's guideline, saying with respect to it: "While acknowledging deference is due, blind adherence is not" (402 F.2d 1331, 1334 (7th Cir. 1972)).

as first expressed by its General Counsel, Charles Duncan (see *supra*, pp. 13-15, 42-44).[55]

Citing *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434 (1971), for the proposition that EEOC guidelines are "entitled to great deference," and stating that the argument here made with respect to the "waffling" by the EEOC was "effectively answered" by the Third Circuit in *Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F.2d 199, the majority of the court below rejected GE's argument that judicial deference should not be accorded to the EEOC's present guideline on pregnancy (Supp. Br. Jt. Pet. 5a, n. 12).[56] In *Wetzel*, the Third Circuit also cited

[55] In *Newmon* v. *Delta Airlines, Inc.*, 374 F. Supp. 238, 245-246 (N.D. Ga. 1973), a case which presented, *inter alia*, the issue of whether Title VII's sex discrimination prohibition was violated by a company's denial of disability and other employment benefits to pregnant female employees, the Georgia court refused to follow the 1972 EEOC guideline on pregnancy disabilities. The court pointed out that the EEOC's 1972 guideline had been issued "almost eight years after the enactment of the Act," and concluded that the guideline was not worthy of judicial deference because "there appears no factual basis upon which these regulations were drawn," and no judicial determination had been made equating pregnancy with a sickness or a disability.

[56] Moreover, the majority of the court below viewed the matter of the EEOC's vacillating position on pregnancy as "beside the point," stating (Supp. Br. Jt. Pet. 5a, n. 12): "We are of the opinion . . . that the guidelines, as presently promulgated, are merely expressive of what is the obvious meaning and purpose of the Act. We entertain no doubt that it was the legislative purpose in enacting Title VII to prohibit any disparity of treatment in compensation and conditions of employment between men and women and this included any disparity that might be sex-related in fringe benefits. *And this would be our opinion whatever might be the language of the Commission's guidelines*" [Emphasis in original].

The assurance with which such reliance is placed by the majority below on "legislative purpose," is difficult to comprehend. See discussion, *supra*, pp. 34-41.

Griggs v. *Duke Power Co.*, and relied primarily on "the plain meaning of the statute" and the "evolutionary process . . . of our legal system" to uphold the EEOC's pregnancy guideline.

We respectfully submit, however, that the Third Circuit's approach in *Wetzel* is singularly unpersuasive. That court's analysis ignores the absence of specific or, indeed, any legislative history concerning Title VII's sex discrimination prohibition; it likewise ignores the evidence of positive Congressional legislative history underlying the ERA, which establishes that pregnancy is to be treated as a unique physical characteristic of one sex (*supra*, pp. 37-41). Additionally, it disregards the "compelling indications" (see *Wetzel*, *supra*, 511 F.2d at 205, citing, *Espinoza*, *supra*, 414 U.S. at 94-95) of administrative error by the EEOC as is shown by this Court's holding in *Geduldig* (*supra*, pp. 26-33). And clearly, as already shown, there is no foundation for the Third Circuit's bald assertion that the EEOC's guideline comports with "the plain meaning" of Title VII (511 F.2d at 205). Indeed, that the EEOC has itself been unable to discern "the plain meaning" of Title VII is manifested by its earlier contrary position.

Nor is the *Griggs* case a dispositive precedent with respect to the EEOC's pregnancy guideline. For in *Griggs* "great deference" was accorded the

EEOC's guidelines on *racial* (as distinguished from *sexual*) discrimination only after it had been demonstrated by a thorough review of the legislative history underlying Title VII's *race* discrimination prohibition provision that ". . . the Act and its legislative history support[ed] the Commission's construction," thereby "afford[ing] good reason to treat the guidelines as expressing the will of Congress." 401 U.S. at 433-34. And none of the latter elements, it is clear, may be adduced to support the guideline here in issue.

In sum, in view of the principles outlined above, the EEOC's 1972 sex discrimination guideline relating to pregnancy and childbirth is not entitled to judicial deference: First, having been issued some seven years after Title VII went into effect, the guideline does not represent a "contemporaneous construction;" and it certainly is inconsistent with the previous contemporaneous, and thoroughly considered, 1966-1971 EEOC position and policy.[57] Indeed, only the 1966-1971 EEOC policy and published construction, reflecting the judgment of those entrusted with

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[57] The dissenting opinion in *Geduldig* cites the EEOC's 1972 guidelines on pregnancy disabilities in support of the position it adopts, 417 U.S. at 501-502; in addition, the dissenting opinion sets forth a quotation from the EEOC's brief, *amicus curiae*, in *Geduldig* to the effect that the EEOC "carefully scrutinized" the matter before it issued the guideline. The EEOC held no hearings on the matter, however, and its *amicus* brief cited no evidence that was unearthed in its "scrutiny." In addition, no reference is made in the Court's opinion in *Geduldig* either to the EEOC's guideline, to the agency's asserted justification for the guideline, or to the reference to it in the dissenting opinion.

setting Title VII's machinery in motion, meet the criteria for deference as enunciated by the Supreme Court. Second, the guideline is also directly contrary to the position of other federal agencies which have dealt with the identical subject matter, and is also unsupported by, if not inconsistent with, expressions of legislative intent.

II. SOUND BUSINESS CONSIDERATIONS UNDERLYING ITS DISABILITY INSURANCE PLAN ESTABLISH THAT GE'S PREGNANCY EXCLUSION IS REASONABLE, JUSTIFIABLE, AND NOT A MERE PRETEXT FOR SEX DISCRIMINATION.

The provisions of Title VII are aimed against practices, procedures, and policies which serve to exclude members of a certain race, sex, religion, and nationality from *opportunities* to gain jobs or job promotions. This was the objective which the Supreme Court sought to further in *Griggs* v. *Duke Power Company*, *supra*, 401 U.S. 424 ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past . . . ," 401 U.S. at 429). Thus, in the words of Judge Widener: "Title VII seeks to equalize opportunity, not create an advantage for either men or women" (Supp. Br. Jt. Pet. 14a).

Less significant and more subtle are certain marginal personnel practices which do not relate to job opportunities, but are merely incidents of a job. One such practice was involved in *Dodge* v. *Giant Foods, Inc.*, 488 F.2d 1333 (1973), where the Court of Appeals for the District of Columbia Circuit vali-

dated an employer's hair length regulations against a charge of Title VII sex discrimination. There, the court of appeals said (488 F.2d at 1336): "Title VII serves the important goal of eliminating *arbitrary* sex discrimination in employment" [emphasis added]. Then, after quoting Judge Gesell's statement in *Boyce* v. *Safeway Stores*, 351 F. Supp. 402, 404 (D. D.C. 1972), that the laws outlawing sex discrimination "must be realistically interpreted," the court of appeals went on to say (488 F.2d at 1337): "The issue in these cases is *one of degree* . . . [T]he line must be drawn somewhere between these two extremes. . ." [emphasis added]. We submit that the matter of employee benefits is also one of degree, of drawing the line somewhere between extremes—especially as here, where only one aspect of the many insurance benefits that GE provides for its employees is involved.

Geduldig, though couched in the language of equal protection, implicitly recognizes these principles and elements. There California's exclusion of pregnancy-related disabilities from its disability insurance coverage was upheld because the state had demonstrated, on the basis of cost and other considerations, that the exclusion was "rationally supportable," 417 U.S. at 495-96. In either case, whether the issue is viewed as one of degree, as in *Giant Foods*, or as one of rational support, as in *Geduldig*, there are sound business considerations that justify GE's exclusion of pregnancy-related disabilities from coverage under its sickness and accident insurance.

A. Compelling Business Considerations Underlie And Justify GE's Pregnancy Exclusion.

In creating a benefits program, the employer (and union) seeks a balanced package of many benefits which best serve overall employee needs. In effect, since no benefits package can satisfy all wants of all employees, the employer seeks to utilize his benefits dollars in the best overall way. Looked at in this way, the nature of a benefit which would maintain pay to employees for time out due to pregnancy simply would not be, GE believes, and showed, a reasonable and prudent use of benefit money. One reason for GE's belief in this respect derives from the nature of pregnancy—that it is, as shown *supra*, pp. 11-13, a voluntarily induced and maintained condition which is not a sickness. By contrast, weekly sickness and accident insurance is intended to soften the blow to employees of an unintended and unexpected sickness or accident; pregnancy, on the other hand, is not such an occurrence, and a pregnancy benefit would not satisfy this purpose.[58]

There are additional reasons which support GE's belief that the payment of a pregnancy benefit would not be a rational and prudent use of benefit money.[59]

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[58] Mr. Hilbert, GE's Labor Relations Counsel, thus explained GE's position: "[I]n todays world pregnancy is completely voluntary" (II App. 597), and is "plan[ned]" (II App. 600). In the latter context, the planning involves at least a nine months cycle, allowing financial preparation for the birth. "In a very real sense . . . planning to have a baby is financially very much like planning to take a trip or to take a course in college . . . so that we think that is a consideration that we should keep in mind and which runs against the granting of this kind of benefit" (II App. 599-600).

[59] These reasons were also axplained by Mr. Hilbert, GE's Labor Relations Counsel. See II App. 595-96, 600-601.

Thus, a maternity benefit would particularly be subject to abuse in that before delivery the natural concern of the mother for the fetus, in addition to her own discomfort, would cause an earlier departure from work than would occur in the absence of such benefit. Similarly, after delivery, the mother's natural affection and concern for the health and psycological well-being of the newborn child would tend to stretch the post-delivery absence time.[60] Furthermore, as approximately 40 percent of GE female employees who have babies do not return to work,[61] to provide these employees sickness benefits would, in effect, be according them extra severance pay. Additionally, because females are absent from work more frequently than are males, and have absences of greater duration, GE female employees receive a greater proportion of sickness and accident benefits than do male employees;[62] and for this reason a preg-

[60] In this connection, see note 10, above, setting forth GE's experience regarding the duration of pregnancy absences; and see also Mr. Jackson's testimony, summarized *supra*, pp. 9-10, that insurance industry experience shows a difference between the duration of ordinary disability and maternity claims, the latter being considerably longer; and that pregnancy claims are subject to abuse.

[61] See note 6, *supra*. See also, Mr. Jackson's testimony referred to *supra*, p. 9, that approximately 50 percent of the female employees in the United States do not return to work after having babies.

[62] See note, 5, *supra*, in which it is pointed out that in 1970 GE's average cost per insured employee of total benefits paid under its disability insurance was $82.57 for females and $45.76 for males, and that in 1971 the average cost was $112.91 for females and $62.08 for males.

nancy benefit would accentuate the imbalance. Again, the payment of pregnancy benefits would be likely to cause a demand for paid child-care leave for male employees.

Finally, the non-payment of a pregnancy benefit adversely affects but a relatively small number of GE female employees—those within the childbearing age group who are able, and elect, to have children; by contrast, the payment of such a benefit, anticipated to be of great magnitude vis-a-vis the total of all other disability benefit payments, would disadvantage the larger number of GE female employees—those who are of non-childbearing age, or who are unable or unwilling to have children—by diverting a large amount of the funds available to GE for disability benefit payments.

The fact that GE's insurance plan follows standard insurance practice which, for the most part, does not cover pregnancy under sickness and accident insurance, is another important consideration that underlies GE's pregnancy exclusion.[63] See *supra*, p. 8; II App. 595. From a general insurance viewpoint, a pregnancy benefit cannot be considered a reasonable and prudent use of benefit money. For, as the record shows, see *supra*, p. 6, the cost per unit of benefit for a female employee under existing insurance coverage where no maternity benefit is provided is 170 percent of that for a male employee;

[63] Major industrial states have recognized the significance and relevance of insurance industry practices in the context of sex discrimination provisions. See, e.g., Section 1432 of the California Fair Employment Practices Act (BNA FEP Manual 451:132) and Section XI(A) of the Illinois Sex Discrimination Guidelines (BNA FEP Manual 451:355).

the latter figure rises, moreover, to 210 percent of the male cost where a six-weeks maternity benefit is provided, and to 300-330 percent of the male cost where full maternity coverage is provided. Mr. Jackson, the insurance expert who testified in this case, put the annual cost of adding maternity benefits to disability insurance plans in effect in the United States in 1973 at $1,353,000,000.[64] (See *supra*, p. 8).[65]

In *Geduldig*, the Court expressly pointed to the fact that California intended to establish its benefit system as an insurance program in accord with "in-

[64] The $1,353,000,000 cost estimate is the figure testified to by Mr. Jackson in July 1973. Based on the increase in the Consumer Price Index since 1973, the cost estimate would, as of July 1975, be $1,650,000,000. (Thus the ratio of increase of the July 1975 Consumer Price Index (162.3) with respect to the July 1973 Consumer Price Index (132.7) is 22.3 percent; the latter percentage applied to the July 1973 cost estimate shows an increase of $297,000,000.)

[65] An article in The Wall Street Journal for November 11, 1975, p. 1, sets forth the experience of Xerox Corporation with respect to pregnancy coverage under its 26 week disability plan. The pregnancy coverage was instituted in late 1972. A study of 178 salaried employees whose pregnancies terminated in 1973 showed that the average claim was $1,544 with a total benefits cost of $274,830. Like GE's experience, Xerox found that of the group studied, 96 female employees quit after receiving disability pay while 82 female employees returned to work. Xerox determined that the average employee was "disabled" by pregnancy almost 75 days. However, time off ranged from 7 days to 226 days. Xerox found no correlation between length of service and the number of disability days. Although analysis of 1974's experience is not yet complete, Xerox has found that the per-case costs that year "increased considerably" over 1973.

surance concepts" (417 U.S. at 492). Among the factors, moreover, that led the Court to conclude that California's pregnancy exclusion was "rationally supportable" was the Court's recognition that to cover the excluded pregnancy risks "would be substantially more costly," and that California had an interest in distributing "available resources" in such a way "as to keep benefit payments at an adequate level for the disabilities that are covered rather than to cover all disabilities inadequately" (419 U.S. at 495-96). As shown, GE, too, has followed insurance practice and concepts in excluding pregnancy; it, too, has sought to distribute "available resources" in an equitable manner between male and female employees. Moreover, although the courts below refused to consider GE's cost evidence,[66] *Geduldig* expressly recognizes the relevancy of "costs" with respect to a pregnancy exclusion (417 U.S. at 492-96).

In sum, we respectfully submit, GE's pregnancy exclusion is a non-discriminatory provision, see *supra*, pp. 26-30, which is entirely justifiable on the basis of important reasons relating to the operation of GE's business and the benefits package it provides to *all* its employees.

B. The Absence Of Pretextual Motivation

Geduldig established that the exclusion of pregnancy from coverage under a disability insurance

[66] The district court found it irrelevant that in not granting maternity benefits GE wished to avoid "increased costs" (Jt. Pet. 31a). The majority of the court of appeals found it "unnecessary to consider" cost evidence "[s]ince we do not consider *Geduldig* in point here" (Supp. Br. Jt. Pet. 11a, n. 23). See also, *Wetzel, supra*, 511 F.2d at 206.

program does not discriminate on the basis of sex unless it is a "mere pretext[] designed to effect an invidious discrimination against members of one sex or the other" (417 U.S. at 496-97, n. 20). As the foregoing demonstrates, GE's decision to exclude pregnancy-related disabilities from coverage under its sickness and accident insurance plan in no way resulted from a sex discrimination pretext, but rather came about through a careful weighing of crucial business considerations.[67]

The reliance GE placed on governmental interpretations validating a pregnancy exclusion underscores the absence of discriminatory intent on GE's part. Thus after Title VII's enactment, Mr. Hilbert, GE's Labor Relations Counsel, undertook a review of GE's

[67] GE did not, and does not, seek to justify its position with a "business necessity" defense under Section 703(e) of Title VII (42 U.S.C. § 2000e-2(a)) which provides that: "Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."

To be sure, however, and as we show in the text, "business considerations" are among the reasons for GE's adoption of the pregnancy exclusion. Such "considerations" are material here, not for a Section 703(e) reason, but rather because of the twinfold reason that they show: (1) a "rationally supportable" justification for the pregnancy exclusion within *Geduldig's* meaning; and (2) the absence of pretextual motivation also under the *Geduldig* rationale. In view of the controlling weight of *Geduldig*, the contrary dictum of the majority of the court of appeals as to the immateriality of "business considerations" (see Supp. Br. Jt. Pet. 10a-11a, n. 23) clearly is erroneous.

labor contracts and practices. The pregnancy exclusion was specifically considered. Several factors led Mr. Hilbert to conclude that a maternity benefit was not required. First, was the fact that no state agency had ever questioned the pregnancy exclusion, even though many states had statutes outlawing sex discrimination which predated Title VII and which had been vigorously enforced. Next, the labor services, particularly CCH, published an opinion letter by the EEOC General Counsel, dated October 17, 1966, see *supra*, pp. 14-15, which "confirmed" Mr. Hilbert's belief, based on GE's experience under the state laws, that the pregnancy exclusion did not violate the law; and Mr. Hilbert so informed the GE management (II App. 587-88).[68]

Considering the weighty business reasons which guided GE's action, as well as the fact that it was supported in its position by governmental interpretations, the record before this Court clearly demonstrates that GE's exclusion of pregnancy-related disabilities from its insurance coverage was not motivated by a sex discrimination pretext.

[68] In concluding that the pregnancy exclusion was not violative of Title VII, Mr. Hilbert was also guided by, and relied upon, sex discrimination guidelines issued by the Office of Federal Contract Compliance (III App. 855), which are applicable to government contractors like GE, and which permit employers to exclude pregnancy absences from weekly disability payments (II App. 591).

III. BECAUSE PREGNANCY IS NOT A DISEASE, SICKNESS OR ILLNESS, AND BECAUSE IT IS VOLUNTARILY INDUCED AND MAINTAINED, ITS EXCLUSION FROM COVERAGE UNDER GE'S SICKNESS AND ACCIDENT INSURANCE PLAN IS NONDISCRIMINATORY, PERMISSIBLE, AND REASONABLE.

GE's sickness and accident insurance plan covers total disability resulting from non-occupational sickness and accidents. Thus to be reimbursed under the plan an employee must be totally disabled and the disability must be caused by sickness or an accident (III App. 1064-65).[69] Admittedly, there is some total disability associated with all pregnancies, for immediately before, during, and directly after delivery a woman cannot work; viewed in terms of a nine-month pregnancy, however, the time of such disability is relatively brief. But even though pregnancy, at least peripherally, satisfies one of its conditions—disability—the insurance can apply only if the pregnancy disability is the result of a sickness or an accident. The record evidence shows: (1) that pregnancy is not a sickness; and (2) that it is a condition voluntarily induced, and not the result of an accident.

One reason for GE's exclusion from coverage of pregnancy-related disabilities is that pregnancy is

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[69] In the Plan, the term "disability" is not specifically defined; in context, it does, however, connote a "sickness or accident [which] keeps you away from your job" (III App. 1062). The term "nonoccupational" is defined to mean "any sickness or injury not arising out of or in the course of employment and not entitling you or a covered dependent to benefits under any Workmen's Compensation or Occupational Disease Law" (III App. 1072).

not a sickness or disease. See *supra*, p. 6. The expert medical testimony shows this to be so, see *supra*, pp. 10-11, and the district court specifically found as fact that "Pregnancy *per se* is not a disease" (Jt. Pet. 20a).[70] Accordingly, insofar as the "sickness" aspect of GE's insurance coverage is concerned, the pregnancy exclusion is entirely justifiable.[71] To state the matter somewhat differently: it is evident on the record before the Court that the normal events of pregnancy are not, medically speaking, so similar to those of sickness or disease as to compel the conclusion that the basis for the lack of coverage is proscribed sex discrimination.[72]

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[70] Accord, *Newmon* v. *Delta Airlines, Inc.*, 347 F. Supp. 238, 245 (N.D. Ga. 1973).

[71] The majority of the court of appeals erroneously rejected GE's contention that pregnancy is not a sickness. In thus "equating" pregnancy with sickness (Supp. Br. Jt. Pet. 6a), the majority below inexplicably relied on obscure cases in the field of labor arbitration, and selectively ignored applicable insurance industry precedents, the uncontradicted contrary medical testimony in this case that pregnancy is not a disease, as well as the explicit finding of the district court to the same effect.

[72] The fact that the so-called complications of pregnancy are not covered under GE's sickness and accident insurance does not significantly differentiate this case from *Geduldig* where only disabilities accompanying normal pregnancies were excluded from coverage under California's insurance plan. 417 U.S. at 490. As the record in this case shows, and as we have set forth in detail above, p. 11, only between 1/10 and 3/10 of one percent of the women who become pregnant have "major" complications which require hospital treatment. In these circumstances, the matter of pregnancy complications is, as far as this case is concerned, a matter of *de minimis* consequence.

[Footnote continued on page 64]

Additionally, GE excludes pregnancy from sickness and accident coverage because it is not the result of an accident. See *supra*, p. 6. The expert testimony adduced at trial established that pregnancy, unlike sickness and the physical conditions resulting from accidents, is a voluntarily induced condition which can either be avoided through the use of contraceptive devices [73] or terminated through abortion.[74] See, *supra*, pp. 11-13.

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[72] [Continued]

In any event, even if the complications of pregnancy are deemed sicknesses which must be covered under GE's disability insurance, it by no means follows that GE's failure to cover disabilities accompanying normal pregnancies constitutes a violation of Title VII.

[73] Catholics also "seek to plan their pregnancies, their childbirths" (II App. 601). In this connection, it is noted that the "rhythm method" of birth control is doctrinally acceptable to Catholics. Moreover, only about one forty-fifth of GE's female employees within the childbearing ages are Catholics who might have possible scruples against birth control and abortion (II App. 598-99). Thus to allow a maternity benefit on the claimed basis that childbirth is involuntary as in the case of Catholics, would be "in a sense . . . favoring one religion over another" (II App. 599).

[74] *Roe* v. *Wade*, 410 U.S. 179 (1973), held that within the first trimester elective abortions are a matter solely between the pregnant woman and her doctor, and that the states cannot prohibit or regulate the exercise of that right. At least two courts have rejected the argument that an abortion alternative to pregnancy violated a woman's First Amendment right to free exercise of religion. In *Struck* v. *Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1972), vacated on other grounds, 409 U.S. 1071 (1973), an Air Force Officer faced discharge for pregnancy under an Air Force Regulation which also permitted cancellation of the discharge

The majority of the court below rejected as a defense "this idea of voluntarism" on the ground that GE had not eliminated from disability insurance coverage all so-called voluntary disabilities, noting in this connection that GE had made its insurance applicable to such matters as injuries resulting from athletic competition and disabilities arising from attempted suicides (Supp. Br. Jt. Pet. 6a-7a). We submit, however, that in thus lumping it with matters that are so different in kind and substance, the courts below failed utterly to place pregnancy in its true context. For pregnancy is essentially a happy and desirable event, and comparisons, or analogies, such as those made by the courts below, are ill-conceived. As Dr. Forrest testified: "I think one [the act of becoming pregnant] has a very hopefully, joyous outcome and the other [becoming an alcoholic through drinking, or getting cancer through smoking] has nothing but dire circumstances" (I App. 362).[75]

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proceedings if the pregnancy was terminated. Captain Struck argued that as a Catholic she could not have an abortion and, therefore, she was unable to take advantage of the cancellation clause. The Ninth Circuit rejected her First Amendment argument. 460 F.2d at 1377. See, also, *Gutierrez* v. *Laird*, 346 F. Supp. 289, 293 (D.C. D.C. 1972).

[75] Both the majority of the court of appeals (Supp. Br. Jt. Pet. 7a) and the district court (Jt. Pet. 28a) also regarded the fact that GE's disability insurance covers cosmetic surgery as negating GE's defense of voluntarism. But such coverage is a "de minimis problem" (II App. 608). Further showing its minimal nature is the fact that GE will not pay the *medical* expenses connected with cosmetic surgery or treatment "except to the extent necessary for correction of

In view of the foregoing, it is clear that pregnancy is not a condition which is covered by GE's sickness and accident insurance plan; for it cannot plausibly be contended, we submit, that pregnancy is either a sickness or a condition caused by an accident. Thus, pregnancy, unlike any sickness or accident, results from the cumulative, three-fold exercise of free will necessary for a woman to bear a child: (1) there must be a voluntary decision to marry, as marriage still reflects by far the current standard of morality; (2) the couple must elect that conception will result—i.e., must elect to reject the various methods available for avoiding pregnancy; and (3) if conception takes place, the couple must elect to accept the pregnancy and have the baby, and not to terminate the pregnancy by abortion. Finally, it should be noted that even for the unmarried, the latter two choices are viable alternatives to the pregnant state.[76]

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damage caused by accidental injury while insured" (II App. 608; Pls. Exh. 6, p. 24, (not reproduced in Appendix))—thus minimizing the likelihood that an employee will be absent from work for the purpose of having cosmetic surgery performed for aesthetic reasons alone.

Furthermore, "the number of total disabilities resulting from such causes [alcoholism, drug addiction, elective surgery, etc.] are infinitesimal and payment for such disabilities rarely occurs. In addition, the same policy applies with respect to female employees" (GE Answers to Plaintiffs' Interrogatories 46-51; I App. 213, 242, 191).

[76] An article "The New Parents" in the New York Post, December 11, 1973, Magazine p. 1, describes the "mainstream" of today's thinking concerning couples having babies as follows: "Interviews with scores of expectant and recent parents, as well as statistical data make it quite plain that virtually foolproof birth control, backed up by more social acceptance of couples who choose not to have children, have

CONCLUSION

The exclusion of pregnancy from disability insurance coverage does not constitute unlawful sex discrimination. Furthermore, employee disability insurance, which typically is only one component of a comprehensive insurance package provided by employers for the protection of employees, is intended to soften the blow of an unintended and unexpected sickness or accident. Specific insurance coverage must be carefully calculated in terms of how best to apportion finite benefit dollars. The coverage of pregnancy-related disabilities would be extremely costly, and compulsory coverage would, therefore, result in a substantial decrease in the dollars available to fund not only the disability coverage itself but the other parts of the insurance package as well. Moreover, a mandatory readjustment of insurance priorities would not contribute to the benefit of the greater number of employees; rather, it would benefit only a small segment of the work force—those women who can and do elect to become pregnant. In this case, where the insurance coverage involved is restricted to disabilities resulting from sickness and accident alone, the exclusion of pregnancy from the coverage is singularly appropriate because, as the record demon-

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made the decision to have a child just that—a decision, a choice—more than has ever before been true." The same article quoted the following statement by Dr. Charles Westoff of Princeton University, a director of the National Fertility Study of the Federal Institute of Child Health and Human Development: "We're coming closer to the 'perfect contraceptive' society where the overwhelming majority of births will occur only if and when people want them to."

strates and the district court expressly found, pregnancy is neither a sickness nor the result of a chance occurrence.

We urge therefore that the judgment of the court below be reversed.

Respectfully submitted,

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APPENDIX

The full text of the relevant Equal Employment Opportunity Guideline on Discrimination Because of Sex, as issued on March 30, 1972 (37 F.R. 6835), effective April 5, 1972, 29 C.F.R. 1604.10, is as follows:

> Employment Policies Relating to Pregnancy and Childbirth.—(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the ability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.
>
> (c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or

no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.